

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE BOARD OF VETERINARY MEDICINE

In the Matter of the Veterinary License
of Carl W. Seeman, D.V.M., License
No. 962

**FINDINGS OF FACT, CONCLUSIONS
AND RECOMMENDATION**

The above matter came on for hearing before Administrative Law Judge Linda F. Close on August 7, 8, and 9, 2007. The OAH record closed on October 2, 2007, upon receipt of post-hearing briefs.

Peter Krieser and Tiernee Murphy, Assistant Attorneys General (AAG), 445 Minnesota St. #1400, St. Paul MN 55101-2131 appeared on behalf of the Complaint Review Committee (CRC) of the Board of Veterinary Medicine (Board).

Zenas Baer, Zenas Baer and Associates, P.O. Box 249, 331 Sixth Street, Hawley, MN 55-6549 appeared on behalf of Carl W. Seeman, D.V.M. (Respondent).

STATEMENT OF THE ISSUES

1. Did Respondent engage in conduct demonstrating incompetence in the practice of veterinary medicine, including departure from the acceptable and prevailing practice in violation of Minn. Stat. § 156.081, subd. 2 (11) and Minn. R. 9100.0800, subp. 1¹?

2. Did Respondent engage in unprofessional conduct as defined in statute and rules of the Board or engage in conduct that violates any statute or rule of the Board in violation of Minn. Stat. § 156.081, subd. 2 (12); Minn. R. 9100.0700, subp. 1B and C and 9100.0800, subp. 1?

3. Did Respondent engage in conduct that violates a statute or rule of the Board and constitutes an imminent risk of harm to others in violation of Minn. Stat. § 156.126?

¹ The Notice of Hearing referred to Minn. R. 9100.0800, subp. A. Subpart A does not exist; subpart 1 does, and this appears to be the correct citation. Respondent noted this error and argued the case on the assumption that the correct cite is subpart 1.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Respondent's Practice

1. Respondent graduated from the veterinary school at Colorado State University in 1948.² Respondent practiced in Bagley, Minnesota for approximately six and one-half years. Thereafter, he practiced briefly in his hometown, Gaylord, Minnesota, before moving to Bemidji, Minnesota.³ In January 1957, Respondent opened Hilltop Animal Hospital in Bemidji, Minnesota, where he has practiced since.⁴

2. Respondent had Hilltop Animal Hospital designed and built so that he and his wife could live in the upper level of the building, and hospital patients could enter the lower level hospital through a separate entrance.⁵ The hospital includes an examination room and a surgical suite. It is equipped with x-ray, anesthesia, dental and EKG machines. It has an x-ray viewer and a microscope. There is a library and a reception area.⁶

3. Respondent's practice is a small animal practice. He performs approximately 20 declaws, spays and castrations per year. His wife, Margaret Seeman, assists him in his practice, and they are its sole employees.⁷ Margaret Seeman answers the phone, makes appointments, feeds and waters the animals, cleans cages, and exercises the dogs.⁸ She also assists Respondent during surgery.⁹ Because the Seeman home is located above the hospital, Respondent and his wife are able to hear animals and attend to them during the night. The Seemans set their alarm clock so that they can check on animals during the night.¹⁰

4. Respondent regularly attends continuing veterinary education courses. Following each class, he writes notes on 3 x 5 note cards, which he then files alphabetically for future reference. These note cards now fill two 12" x 6" file drawers.¹¹ Respondent believes he has attended more continuing education courses than any other veterinarian in Minnesota.¹²

² Transcript (T.) at 396.

³ T. at 398.

⁴ T. at 399.

⁵ T. at 399-400.

⁶ T. at 417-20; Ex. 127.

⁷ T. at 279.

⁸ T. at 631.

⁹ T. at 424.

¹⁰ T. at 633-34.

¹¹ T. at 407-8; Ex. 127.

¹² T. 267.

5. During the 1960s, Respondent developed a surgical procedure to alleviate excruciating back pain in animals with bulging disks. Respondent has presented and published the methodology he developed. It continues to be used to relieve pain in affected animals.¹³ Respondent's work has been cited in *Canine Neurology*, a text by a leading expert in canine neurology, Dr. Hoerlein.¹⁴

Care of Jazz

6. On May 29, 2006, Linda Lovegreen and Gerald Johnson presented to Hilltop Animal Hospital with their yellow lab, Jazz. Jazz had suffered a compound fracture of a leg during a boating accident that day.¹⁵ The owners found Respondent through the yellow pages.¹⁶

7. Respondent administered ketamine¹⁷ and Versed¹⁸ in order to relax Jazz while Respondent took x-rays of Jazz's leg.¹⁹ Respondent then discussed with Jazz's owners their options for the care of Jazz, which consisted of leaving Jazz with Respondent for surgery or taking Jazz back to their home in the Twin Cities for surgery.²⁰ The owners opted to leave Jazz with Respondent, who indicated he would perform surgery the following day.²¹

8. Respondent did not give Jazz any pain medication between the time of the x-rays on May 29th and the surgery on May 30th.²² The surgery was an open reduction in which Respondent made a four inch incision. He was able to snap the fractured bone pieces together so that they fit perfectly. He then fixed the bone pieces with three screws. Respondent did not give Jazz any pain medication when Jazz woke up after the surgery.²³

9. Margaret Seeman had assisted in the surgery.²⁴ Following the surgery, she called Linda Lovegreen and spoke with her about the surgery. Lovegreen asked whether Respondent had given Jazz any pain medication after the surgery. Margaret Seeman reported that he had not.²⁵ Margaret Seeman told Lovegreen that the surgery had been difficult and that Respondent wanted to

¹³ T. 425-27; Ex. 116.

¹⁴ T. 434; Ex. 123.

¹⁵ T. at 228, 463; Ex. 105

¹⁶ T. at 228.

¹⁷ Ketamine is a drug that has analgesic effect. T. at 51.

¹⁸ Versed is a muscle relaxant that has no analgesic effect. T. at 51.

¹⁹ T. at 303.

²⁰ T. at 229.

²¹ T. at 229.

²² T. at 304.

²³ T. at 304-05.

²⁴ T. at 643-44.

²⁵ T. at 645.

keep the dog for a week or two.²⁶ Respondent believed that four to five days after surgery, the fracture would be beginning to heal and strengthen.²⁷

10. The owners became concerned about leaving Jazz in Respondent's care due to their concerns about Respondent not treating Jazz's pain.²⁸ The owners decided to pick Jazz up from Respondent's hospital and bring him to a Twin Cities veterinarian. Johnson went to the hospital the day after the surgery. Johnson saw that Jazz was in pain. Jazz didn't relate to Johnson, and his tail did not wag. He was lethargic, and his head was down.²⁹ Jazz walked on three legs and was lifted into Johnson's car.³⁰ Respondent gave Jazz torbugesic for pain, because he believed the ride back to the Twin Cities would be difficult for Jazz.³¹

Care in Declaw, Spay, and Surgical Procedures

11. On September 20, 2006, the CRC met with Respondent to discuss Respondent's care of Jazz. During the conference, the CRC also discussed with Respondent his pain management protocols for declaw, spay and other surgical procedures.³²

12. Respondent does not routinely administer post-surgical pain medication. Respondent does not administer pain medication until he observes the animal in pain after the animal has recovered from the anesthesia. At the time of the CRC conference, Respondent did not know what pre-emptive pain medication was. Respondent believes that pain management is in the process of being developed in veterinary medicine.³³ Respondent believes pain medication is a new trend in veterinary medicine.³⁴

13. For declaw procedures, Respondent uses a combination of Versed and ketamine, followed by an inhaled anesthetic. The declaw surgery used by Respondent removes only about one-fifth of the tissue removed in the whole-digit surgery typically performed at the University of Minnesota. Respondent does not automatically administer post-surgical pain medication in declaw cases because he does not observe the cat to be in pain. Respondent determines on a case-by-case basis whether a cat needs pain medication.³⁵

14. For spays, Respondent has not routinely administered post-surgical pain medication. He believes the animals he has operated on look happy after

²⁶ T. at 231.

²⁷ T. at 361.

²⁸ T. at 232; Ex. 3.

²⁹ T. at 229-30.

³⁰ T. at 641.

³¹ T. at 308.

³² Ex. 4.

³³ T. at 288-90.

³⁴ T. at 283.

³⁵ T. at 299-302.

surgery. He does not want to give medication that will have a sedative effect on the animal. If the Board requires him to give post-surgical pain medication, he will do it. Otherwise, he would judge each case individually.³⁶

15. For orthopaedic surgeries, Respondent has not routinely prescribed post-surgical pain medication. He has used his judgment based on observations of the animal.³⁷ He now believes that he has not been as aware of post-surgical pain as he might have been.³⁸

16. As to fractures, Respondent believes that he has not been “up to snuff” regarding post-surgical pain medication.³⁹

17. In January 2007, Respondent attended the North American Veterinary Conference (NAVC) in Orlando, Florida. He attended ten hours of pain management courses while he was there.⁴⁰ At hearing, in answer to questions about what he had learned, Respondent testified as follows:

- a. His ideas about pain management have been “absolutely” changed.⁴¹
- b. Overusing pain medication can have damaging effects.⁴²
- c. An animal must be allowed to recovery from anesthesia before any analgesia is given.⁴³
- d. He would “strongly consider” whether a declaw patient was in pain before giving pain medication.⁴⁴
- e. Non-steroidal anti-inflammatory drugs (NSAIDs) interfere with healing.⁴⁵
- f. He does not know the difference between one class of drug and another.⁴⁶
- g. He does not know that one of the drugs he was using, ketamine, would provide pain relief if he gave it intravenously.⁴⁷

³⁶ T. at 291-92.

³⁷ T. at 295; Ex. 4.

³⁸ T. at 297.

³⁹ T. at 299.

⁴⁰ T. at 267-68.

⁴¹ T. at 269.

⁴² T. at 270.

⁴³ T. at 289.

⁴⁴ T. at 301.

⁴⁵ T. at 309-13.

⁴⁶ T. at 310.

⁴⁷ T. at 478-79.

- h. He would not change his pain management protocol for declaws.⁴⁸

Expert Testimony of the Committee

18. Dr. Jane Quandt testified as an expert witness on behalf of the CRC. From 1991 until 1999, she taught anesthesiology at the University of Georgia College of Veterinary Medicine. In 1993, Dr. Quandt became certified as an anesthesiologist by the American College of Veterinary Medicine. From 1999 until 2001, Dr. Quandt was a resident in small animal emergency and critical care at the University of California, Davis. She has taught and practiced at the University of Minnesota for the past six years. Dr. Quandt offered the following expert testimony:

- a. Standards of care for pain management have developed within the past twenty years and have been taught at the University of Minnesota for at least the past six years.⁴⁹
- b. Dr. Quandt routinely consults with outstate veterinarians about pain management in their cases. Consequently, she is familiar with the statewide standard of care.⁵⁰
- c. Pain in animals follows the same nociceptive pathway as it follows in humans. Since animals experience pain as humans do, animal pain should be treated as human pain is.⁵¹
- d. Untreated pain becomes heightened because the body becomes increasingly sensitized to pain. This is referred to as a “wind up” process.⁵² Consequently, pain should be managed pre-emptively.⁵³ Pre-emptive, intra-operative pain medication prevents nerve plasticity, in which stimulated nerves become hyper sensitized.⁵⁴
- e. Pain management is not a new development in veterinary medicine, although there are new modalities and new techniques.⁵⁵
- f. Analgesics, including NSAIDs, should be administered in combination because this provides longer relief than administering a single drug.⁵⁶

⁴⁸ T. at 302.

⁴⁹ T. at 29, 120, 148.

⁵⁰ T. at 30-31.

⁵¹ T. at 42-44; Ex. 16.

⁵² T. at 34.

⁵³ T. at 35, 52.

⁵⁴ T. at 50.

⁵⁵ T. at 104; 109.

⁵⁶ T. at 55.

- g. The American Animal Hospital Association (AAHA) has published its 2003 pain management requirements that direct pre-emptive use of pain management; prescribe analgesic therapy as a tool to confirm the existence of pain; and require pain management for all surgical procedures.⁵⁷
- h. *The Handbook of Veterinary Pain Management* is a reliable authority on the treatment of pain in animals.⁵⁸ The book describes a number of procedures and explains for each the source and level of pain; treatment options; and drugs to be used pre-, intra- and post-procedurally. The book is authoritative and was published in 2002.⁵⁹
- i. The *Companion Animal Pain Management Handbook* describes various procedures and the degree of pain anticipated for the procedure. It sets forth two sample protocols for pre-, intra-, and post-operative analgesia. The book was published in 2002 and is authoritative.⁶⁰
- j. The minimum standard of acceptable and prevailing practice for cat declaws is to provide post-operative pain relief.⁶¹ Failing to provide it is cruel.⁶²
- k. The minimum standard of acceptable and prevailing practice for spays is to provide post-operative pain relief.⁶³
- l. The minimum standard of acceptable and prevailing practice for administration of post-operative pain relief requires that relief be given before recovery from anesthesia.⁶⁴
- m. The minimum standard of acceptable and prevailing practice requires that an animal be given analgesia anytime there is a surgical procedure.⁶⁵
- n. The minimum standard of acceptable and prevailing practice for the fracture reduction performed on Jazz required the use of analgesia pre- and post-operatively.⁶⁶

⁵⁷ Ex. 16, Appendix 1.

⁵⁸ T. at 81-2.

⁵⁹ Ex. 15.

⁶⁰ T. 41; Ex. 16.

⁶¹ T. at 90.

⁶² T. at 92.

⁶³ T. at 107.

⁶⁴ T. at 102.

⁶⁵ T. at 103.

⁶⁶ T. at 114.

19. Dr. Carl Jessen testified as an expert witness on behalf of Respondent. Dr. Jessen taught veterinary radiology at the University of Minnesota until he retired about two years ago. He has not performed a declaw, spay or orthopaedic surgery since the early 1960s.⁶⁷ As an associate dean at the University, Dr. Jessen was aware of the teaching curriculum. As the head of the animal research facilities, he was aware of standards of care relative to pain management at least until his retirement. He is “not 100%” familiar with these standards.⁶⁸ Dr. Jessen offered the following expert testimony:

- a. There are no published standards on pain management. Standards are instead learned. Pain medication is up to the judgment of the individual veterinarian.⁶⁹
- b. Pain management issues came to the forefront of veterinary medicine in the 1970s due to federal laws regulating animal research facilities. Standards for pain management in the research facility were high, but those in the teaching hospital were higher still. The standards in the community of practitioners outside the university setting are not as high.⁷⁰
- c. Veterinary students have been taught the effects of analgesics on heart rate and other functions since 1946.⁷¹
- d. He is not aware of the publication of the 2003 AAHA requirements for pain management.⁷² He is aware of, but has not read, the *Companion Animal Pain Management Handbook* or *The Handbook of Veterinary Pain Management*.⁷³

20. Dr. James Wilson also testified as an expert witness on behalf of Respondent. Dr. Wilson obtained his doctor of veterinary medicine degree from Iowa State University in 1967. In 1973, he obtained his *juris* doctorate from the University of California, Los Angeles. Since 1989, he has taught at the University of Pennsylvania, where he teaches legal use of veterinary drugs. He has also taught legal and business management subjects to veterinary students at colleges and universities throughout the United States, including in Iowa and Minnesota.⁷⁴ Dr. Wilson has not performed a surgical procedure since 1987.⁷⁵ Dr. Wilson offered the following expert testimony:

⁶⁷ T. at 376.

⁶⁸ T. at 378-80.

⁶⁹ T. at 382-83; 388.

⁷⁰ T. at 385-86.

⁷¹ T. at 390.

⁷² T. at 391.

⁷³ T. at 393.

⁷⁴ Ex. 103; T. at 535.

⁷⁵ T. at 516.

- a. He has acquired knowledge of pain management standards of care through recent book learning. He felt he could no longer teach professional negligence classes without referring to pain management because it has become a “hot topic” in the last two to three years.⁷⁶
- b. He has also acquired knowledge of pain management standards of care by discussing the subject with a board-certified anesthesiologist, Heidi Schafford.
- c. Dr. Wilson is not aware of any published standards of practice for the use of analgesics.⁷⁷
- d. Dr. Wilson believes that standards of care are different depending on whether the practice is a primary care practice, a secondary (or referral) practice, or a tertiary (university) practice.⁷⁸
- e. Dr. Wilson also believes that standards of care are different depending on whether veterinary services are delivered according to a pediatrician (animal-focused or anthropologic) model or a garage-mechanic (owner-focused, utilitarian) model of care. Under the garage-mechanic model, the animal is viewed as chattel and the owner’s wishes are paramount.⁷⁹
- f. Dr. Wilson further believes there is a standard of care based on pure economics: Class A is the best, most expensive care; Class B is for those who can’t afford Class A; and Class C is for those who have very limited resources to spend on pet care. Class F is the euthanasia class.⁸⁰
- g. Dr. Wilson does not believe there was a standard of care for pain management in May 2006.⁸¹
- h. Dr. Wilson believes that Respondent’s care of Jazz met the minimum standard of care for pain management.⁸²
- i. Dr. Wilson believes that whether the standard of care for pain management is met with respect to a spay depends on the ability of the owner to pay.⁸³

⁷⁶ T. at 500.

⁷⁷ T. at 507-08.

⁷⁸ T. at 538-40.

⁷⁹ T. at 541-42.

⁸⁰ T. at 543.

⁸¹ T. at 544.

⁸² T. at 581.

⁸³ T. at 585.

- j. Dr. Wilson believes Respondent violated the standard of care by not administering pain medication following declaws.⁸⁴
- k. Dr. Wilson has not read the Minnesota veterinary statute regarding “acceptable and prevailing practice.”⁸⁵
- l. Dr. Wilson had never heard of the “wind up” theory of pain until a student explained it to him earlier this year.⁸⁶

Procedural Finding of Fact

21. On December 24, 2006, the Board issued an Order of Temporary Suspension pursuant to Minn. Stat. § 156.126. Respondent timely requested a hearing, which was set to commence within 45 days of the Order. However, Respondent’s counsel requested a continuance, thereby waiving the statutory hearing requirements in a temporary suspension case.⁸⁷ Subsequently, Respondent retained new counsel, who asked for a further continuance of the hearing date.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Board and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 156.081, 156.127, 214.10 and 214.103.

2. The Board has authority to take disciplinary action against licensed veterinarians under Minn. Stat. §§ 156.081 and 156.127.

3. The CRC gave proper notice of the hearing in this matter and has fulfilled all relevant procedural requirements of law and rule.

4. The CRC has the burden of proof in this proceeding and must establish the facts at issue by a preponderance of the evidence.⁸⁸

5. The CRC has proved by a preponderance of the evidence that Respondent engaged in conduct demonstrating incompetence in the practice of veterinary medicine, including departure from the acceptable and prevailing practice in violation of Minn. Stat. § 156.081, subd. 2 (11) and Minn. R. 9100.0800, subp. 1 as follows:

⁸⁴ T. at 584-85.

⁸⁵ T. at 620-21.

⁸⁶ T. at 617-18.

⁸⁷ See Minn. Stat. § 156.126.

⁸⁸ Minn. R. 1400.7300, subp. 5.

- a. Respondent failed to manage competently the pain of a fracture patient named Jazz and departed from the acceptable and prevailing practice regarding pain management in his care of Jazz.
- b. Respondent departed from the acceptable and prevailing practice regarding pain management for dogs and cats undergoing spays.
- c. Respondent departed from the acceptable and prevailing practice regarding pain management for cats undergoing declaws.
- d. Respondent departed from the acceptable and prevailing practice regarding pain management following surgery.

6. The CRC has proved by a preponderance of the evidence that Respondent engaged in unprofessional conduct as defined in statute and rules of the Board and engaged in conduct that violates any statute or rule of the Board in violation of Minn. Stat. § 156.081, subd. 2 (12) and Minn. R. 9100.0700, subp. 1B and C and 9100.0800, subp. 1 by treating pain unprofessionally in fracture, spay, declaw, and surgery patients.

7. The CRC has proved by a preponderance of the evidence that Respondent engaged in conduct that violates a statute or rule of the Board and constitutes an imminent risk of harm to others in violation of Minn. Stat. § 156.126 by treating pain unprofessionally in fracture, spay, declaw, and surgery patients.

8. As a result of these violations, the Board has the authority to take appropriate disciplinary action against the Respondent's license.⁸⁹

9. The Administrative Law Judge adopts as Conclusions any Findings which are more appropriately described as Conclusions.

10. The bases and reasons for these Conclusions are those expressed in the Memorandum that follows, and the Administrative Law Judge incorporates that Memorandum into these Conclusions.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

⁸⁹ Minn. Stat. §§ 156.081, 156.127.

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge respectfully recommends that the Board take disciplinary action against Respondent's license to practice veterinary medicine.

Dated: October 31, 2007

s/Linda F. Close

LINDA F. CLOSE
Administrative Law Judge

Reported: Transcribed: Three volumes
 Kirby Kennedy & Associates

NOTICE

This Report is a recommendation, *not* a final decision. The Minnesota State Board of Veterinary Medicine will make the final decision after reviewing the hearing record. The Board may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the Board may not make its final decision until after the parties have had access to this Report for at least ten days. During that time, the Board must give each party adversely affected by this Report an opportunity to file objections to the report and to present argument. Parties should contact John King, the Executive Director, Minnesota State Board of Veterinary Medicine, 2829 University Avenue, S.E., Suite 540, Minneapolis, Minnesota 55414, to learn the procedure for filing objections or presenting argument.

The record of this contested case proceeding closes upon the filing of exceptions to the report and the presentation of argument to the Board, or upon the expiration of the deadline set by the Board for doing so.⁹⁰ The Board must notify the parties and the Administrative Law Judge of the date on which the record closes. If the Board fails to issue a final decision within 90 days of the close of the record, the Board must return the record of the proceeding to the administrative law judge for consideration of disciplinary action.⁹¹ Upon a

⁹⁰ Minn. Stat. § 156.126 provides an expedited schedule for the Board to consider and decide a case emanating from a temporary suspension. Respondent, however, waived the statutory schedule by seeking continuances of the hearing. Accordingly, the schedule set forth in this Notice is that applicable to an ordinary licensing matter. The Board, however, may wish to consider the application of the cited statute under circumstances where the statutory hearing schedule has been waived.

⁹¹ See Minn. Stat. § 14.62, subd. 2a.

showing of good cause by a party or the Board, the Chief Administrative Law Judge may order a reasonable extension of that 90-day deadline.

MEMORANDUM

Burden of Proof

In administrative contested case proceedings, “[t]he party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard.”⁹² The Veterinary Practice Act does not specify the standard of proof in disciplinary proceedings, and no other statute specifically addresses the applicable standard of proof in a veterinary license proceeding. Therefore, the CRC’s burden is to prove the facts at issue by a preponderance of the evidence.⁹³

Respondent argues that the applicable standard is “clear and convincing evidence.” Any other standard, he asserts, violates due process. The law is otherwise, however. In *In the Matter of Wang*,⁹⁴ the Minnesota Supreme Court confirmed that the standard of proof for professional licensing matters is the preponderance of the evidence standard. Because of the importance of the outcome to the professional, the Court reminded the fact finder that evidence must have “heft” when it said:

. . . [P]roceedings brought on behalf of the state, attacking a person’s professional and personal reputation and character and seeking to impose disciplinary sanctions, are no ordinary proceedings. We trust that in all professional disciplinary matters, the finder of fact, bearing in mind the gravity of the decision to be made, will be persuaded only by evidence with heft. The reputation of a profession, and the reputation of a professional as well as the public’s trust are at stake.⁹⁵

The Court thus did not boost the standard of proof in *Wang*. But it did admonition fact finders to carefully weigh the evidence and evaluate its quality and quantity. As set forth below, the CRC’s evidence, both in quality and quantity, far outweighs that presented by the Respondent.

⁹² Minn. R. pt. 1400.7300, subpt. 5; See also *In the Matter of Friedenson*, 574 N.W.2d 463, 466 (Minn. App. 1998) (due process not violated by temporary suspension procedures); *In re Uckun*, 733 N.W.2d 778 (Minn. Ct. App. 2007) (due process not violated by application of preponderance of the evidence standard in temporary suspension proceeding).

⁹³ *Friedenson*, *supra*.

⁹⁴ 441 N.W.2d 488 (Minn. 1989).

⁹⁵ 441 N.W.2d at 492. (Emphasis supplied.)

The Need for Expert Opinion

The CRC has alleged three violations: Respondent has practiced incompetently;⁹⁶ he has failed to conform to the minimum standards of acceptable and prevailing practice;⁹⁷ and his practice has created an imminent risk of harm to others on account of his violations of statutes and rules of the Board.⁹⁸ The evidence to prove these charges is of a piece, in that the same conduct violates all three statutory provisions. The charges require the fact finder to ascertain how a professional ought to have conducted his or her practice under the circumstances and then to measure Respondent's conduct against the ascertained standards of conduct.

The Parties have thus focused their arguments on what the standard of care for pain management, if any, is. Proof of standards depends on the testimony of experts.⁹⁹ The CRC presented one expert, and Respondent called two. The ALJ is persuaded that the credible expert testimony clearly supports the existence of pain management standards for fracture, spay and declaw surgeries. And the undisputed factual testimony demonstrates that Respondent did not conform to those standards, failed to practice competently and thereby created a risk of harm to others.

Testimony of the Experts

Of the testifying experts, only Dr. Jane Quandt presented legitimate credentials on the subject of pain management. Dr. Quandt's practice has focused on pain management for more than twenty years. Her knowledge of the subject is both theoretical and practical, because she has researched, studied, taught, and practiced pain management techniques throughout her career. She has practiced in Minnesota for the past six years. During that time, she has consulted with Minnesota veterinarians about their cases, which has enabled her to become familiar with veterinary practice throughout the State.

Dr. Jessen testified for Respondent. Like Dr. Quandt, he has worked at the University of Minnesota. Unlike Dr. Quandt, however, Dr. Jessen lacks recent hands-on surgical experience—in fact, he stopped doing surgery decades ago, and he is now retired. His work at the University, as described in his testimony, apparently was of an administrative nature. Even so, Dr. Jessen knows that pain management has been an important topic in veterinary medicine since the 1970s.¹⁰⁰ He also agreed with Dr. Quandt that opioids and NSAIDs

⁹⁶ Minn. Stat. § 156.081, subd. 2 (11) and Minn. R. 9100.0800, subp. 1.

⁹⁷ Minn. Stat. § 156.081, subd. 2 (12); Minn. R. 9100.0700, subp. 1B and C; Minn. R. 9100.0800, subp. 1.

⁹⁸ Minn. Stat. § 156.126.

⁹⁹ See *Reyburn v. Minnesota State Bd. of Optometry*, 78 N.W.2d 351, 355 (Minn. 1956), citing *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935).

¹⁰⁰ T. at 385.

may be used to treat pain in animals.¹⁰¹ Dr. Jessen admitted that he could not testify to what Minnesota practice standards are regarding pain management.¹⁰²

Dr. Wilson, another expert called by Respondent, is a late-comer to the topic of pain management. His field is veterinary law. Like Dr. Jessen, he has not performed surgeries for many years. Perhaps for this reason, he has taken a theoretical and philosophical approach to the topic of pain management. His sources are books, not clinical practice. While he has apparently had some contact with practicing veterinarians about their pain management practices, there was no evidence that these sources practiced in Minnesota. In addition, unlike Dr. Quandt, any such contacts could not have been for the purpose of providing expert consultation on pain management, since Dr. Wilson is only recently familiar with the topic and has no current clinical experience.

Dr. Wilson and Dr. Jessen do agree with Dr. Quandt on one important issue: both acknowledge that a fracture like that experienced by Jazz would cause pain.¹⁰³ Dr. Wilson also shared Dr. Quandt's opinion that Respondent's failure to give pain medication following declaw did not meet the standard of care.¹⁰⁴

From Dr. Quandt's testimony, it is clear that the minimum standard of care requires the administration of pre-, intra-, and post-operative analgesic. This opinion is supported by standards set out in *The Handbook of Veterinary Pain Management* and *The Companion Animal Handbook*. These sources provide detailed pain management information for practitioners, and they were available well before May of 2006, when Respondent treated Jazz. Dr. Quandt's testimony, based on her clinical experience and knowledge, is both qualitatively and quantitatively superior to that of Respondent's experts.

Respondent argues that Dr. Quandt's testimony compels the conclusion that standards are so variable as not to be real standards at all. In support, he cites Dr. Quandt's statements that standards differ depending on the degree of specialization¹⁰⁵ and the veterinarian's chosen model for practice, be it pediatrician or garage mechanic model.¹⁰⁶ Dr. Quandt, however, made clear that minimum standards are similar between specialist and generalist in that pain requires treatment.¹⁰⁷

As to the different models of practice, Dr. Quandt was never asked and did not state that there were differences in pain management standards

¹⁰¹ T. at 392.

¹⁰² T. at 373.

¹⁰³ T. at 31-36, 392, 617. Dr. Wilson could not opine about whether Respondent's declaw procedure would cause less pain than the declaw procedure used at the University of Minnesota. T. at 587-88.

¹⁰⁴ T. at 584-85.

¹⁰⁵ T. at 162-63.

¹⁰⁶ T. at 174.

¹⁰⁷ T. at 163.

depending on the practice model a veterinarian adopts. Respondent's argument suggests that, since the garage-mechanic model sees the animal as the property of its owner, only the owner can say what the standard of practice should be. The ALJ agrees with the CRC that, regardless of how tort law or property law may view the relationship of an animal owner to the animal, a veterinarian is bound by professional standards set forth under the laws pursuant to which the veterinarian is allowed to practice. Those laws require competence, professionalism, and adherence to the minimum standards of "acceptable and prevailing standards of practice."¹⁰⁸

Respondent also argues that the standard of care differs depending on the geographic location of the practitioner. Northern Minnesota, he asserts, is the proper venue by which to judge standards of practice. The ALJ cannot agree that a diminished standard applies to the care of outstate veterinary patients. By 1916, the Supreme Court had rejected the notion that a professional standard of practice is confined to a village or town.¹⁰⁹ Dr. Quandt deals with outstate veterinarians by fax and phone. Information is readily available through professional journals and on-line resources. The idea that outstate veterinarians are less skilled than their colleagues in the larger cities devalues outstate practitioners and simply has no basis in fact. More importantly, the statutes and rules of the Board make no such distinction.

Application of the Standard of Care

The facts surrounding Respondent's care of animals, including Jazz, are not disputed. Instead of pre-emptively providing pain medication, Respondent relies on his own judgment about whether an animal is having pain before giving pain relief. It is clear from these facts that Respondent's care of animals does not conform to the applicable standards of care as set out by Dr. Quandt. Respondent violated the minimum standards of acceptable and prevailing practice in all his surgical procedures, including that performed on Jazz.

As Dr. Quandt testified, Respondent's approach of waiting to see pain in an animal misses the mark in several ways. To begin with, waiting for the animal to exhibit signs of pain may be futile. Animals are stoic and may seem to be indifferent to pain when they are, in reality, hiding the pain.¹¹⁰ In addition, untreated pain escalates, which means that more pain medication is needed to subdue the pain than if the animal had not become sensitized to pain to begin

¹⁰⁸ Minn. Stat. § 156.081 (11), (12).

¹⁰⁹ See *Viita v. Fleming*, 132 Minn. 128, 155 N.W. 1077 (1916) (citing extensive resources available to physicians in the outstate area that allow a country physician to be on an equal footing with his "city brother"). Respondent argues that *Berres v. Anderson*, 561 N.W.2d 919 (Minn. Ct. App. 1997) *rev. denied* June 11, 1997, dictates standards restricted to the practitioner's locality. The ALJ reads the decision to mean that a statewide standard exists for veterinarians. The court speaks of "standards recognized by the veterinarian community," not standards recognized by a locality. The veterinarian community means the community of veterinarians practicing in Minnesota and regulated by the Board, its rules, and applicable statutes.

¹¹⁰ T. at. 43.

with.¹¹¹ Pain should be treated “on schedule” rather than as needed, for this reason.¹¹² Finally, healing is promoted when the animal is calm and comfortable, as it is when pain has been treated.¹¹³

Dr. Quandt testified emphatically that it is cruel¹¹⁴ not to provide pain medication under circumstances where pain is a normal result of a procedure.¹¹⁵ Pain will occur when an animal is cut open to perform a spay, declaw, or surgery such as the open reduction Jazz underwent.¹¹⁶ Consequently, pain medication is necessary for any surgery.

Respondent did not routinely administer pain medication after declaws, spays, and other surgeries. He stated this to the CRC when he conferenced with them in September 2006, and he continued to admit this at hearing. This failure was not, apparently, the result of cruelty, but of Respondent’s misplaced confidence in his ability to judge an animal’s level of pain. Respondent did not, for example, observe any pain in Jazz. Jazz’s owner, by contrast, recognized that Jazz was in pain as soon as he saw him the day following surgery.¹¹⁷ Respondent’s own experts acknowledged that animals who have surgery experience pain.

Respondent has had a lengthy career in veterinary medicine. It is unfortunate, then, that he appears not to have taken to heart his ten-hour pain management course in Florida this past January. Although Respondent forcefully stated that the course had caused him to re-evaluate his practice, his subsequent testimony demonstrated the opposite. He continues to believe that an animal must recover from anesthesia and undergo Respondent’s evaluation for pain before any pain medication will be administered.¹¹⁸ Respondent does not understand the role of NSAIDs in combination with other medications,¹¹⁹ and he continues to adhere to the notion that pain management is in its infancy in veterinary medicine. Even Respondent’s expert, Dr. Jessen, acknowledged that pain management has been an important topic since the 1970s.

Respondent argues that Dr. Quandt’s testimony compels the conclusion that standards are so variable as not to be real standards at all. In support, he cites Dr. Quandt’s statements that standards differ depending on the degree of specialization¹²⁰ and the veterinarian’s chosen model for practice, be it

¹¹¹ T. at 35.

¹¹² T. at 52.

¹¹³ T. at 45.

¹¹⁴ Dr. Wilson similarly testified that administering pain medication for declaw procedures is an act that prevents cruelty to animals. T. at 584.

¹¹⁵ T. at 92.

¹¹⁶ See Ex. 15, 16.

¹¹⁷ T. at 230.

¹¹⁸ T. at 289, 310.

¹¹⁹ T. at 309-13.

¹²⁰ T. at 162-63.

pediatrician or garage mechanic model.¹²¹ Dr. Quandt, however, made clear that minimum standards are similar between specialist and generalist in that pain requires treatment.¹²²

As to the different models of practice, Dr. Quandt was never asked and did not state that there were differences in pain management standards depending on the model a veterinarian adopts. And the evidence supports the position that, regardless of a veterinarian's philosophical view, the standard of practice requires the administration of pain medication when an animal undergoes a procedure that causes pain.¹²³

Based on Respondent's own testimony and in light of the expert testimony the conclusion that he has violated standards, practiced incompetently and created an imminent risk of harm to others is inescapable.

Respondent's Constitutional Challenge

Respondent argues that his due process rights have been violated in that the rule requiring prevailing standards to be followed is vague. The power to decide constitutional questions is vested in the judicial branch, not the ALJ or the Board.¹²⁴ But, like courts, Administrative Law Judges must interpret and apply statutes and rules in a manner that does not violate our constitutions.¹²⁵

Statutes and rules must meet due process standards of definiteness.¹²⁶ To satisfy due process, laws must give an individual fair warning of what is prohibited.¹²⁷ A statute is void for vagueness if it defines the forbidden or required act in terms so vague that individuals must guess at its meaning, or it defines an act in a manner that encourages arbitrary and discriminatory

¹²¹ T. at 174.

¹²² T. at 163.

¹²³ Even if Respondent's argument that owners dictate standards is accepted, studies show that 99% of owners want their animals to have their pain treated and 91% assume their veterinarian is providing pain medication. Ex. 16. Thus, if owners dictate the standard under a garage-mechanic model, then the animals must surely be treated for pain, since that is what owners want.

¹²⁴ See *Neeland v. Clearwater Memorial Hospital*, 257 N.W.2d 366, 369 (Minn. 1977); *In re Rochester Ambulance Service*, 500 N.W.2d 495, 499-500 (Minn. Ct. App. 1993); *Holt v. State Bd. of Medical Examiners*, 431 N.W.2d 905, 906 (Minn. Ct. App. 1988), *rev. denied* (Minn. Jan. 13, 1989).

¹²⁵ *State v. Crims*, 540 N.W.2d 860, 867 (Minn. Ct. App. 1995), *rev. denied* (Minn. Jan. 23, 1996).

¹²⁶ See *State v. Normandale Properties, Inc.*, 420 N.W.2d 259, 261 (Minn. Ct. App. 1988), *rev. denied* (Minn. May 4, 1988).

¹²⁷ *Minnesota League of Credit Unions v. Minnesota Dept. of Commerce*, 486 N.W.2d 399, 404 (Minn. 1992), *citing State v. Century Camera, Inc.*, 309 N.W.2d 735, 744 (Minn. 1981) (*quoting Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294 (1972)).

enforcement.¹²⁸ If persons “of common intelligence” must speculate as to a statute’s meaning, the statute is impermissibly vague.¹²⁹

The CRC has charged Respondent with “incompetence in the practice of veterinary medicine, including any departure from or failure to conform to the minimum standards of acceptable and prevailing practice....”¹³⁰ The Board’s rules set forth a general standard regarding minimum standards of practice as follows:

The delivery of veterinary care must be provided in a competent and humane manner consistent with prevailing standards of practice for the species and the professed area of expertise of the veterinarian.¹³¹

Respondent’s constitutional argument is similar to that made by the licensee in *Reyburn v. Minnesota Bd. of Optometry*.¹³² The licensee argued that the phrase “unprofessional conduct” in the practice act for optometrists so lacks specificity as to violate due process. In *Reyburn*, the Supreme Court concluded that the Legislature need not specify acts that constitute “unprofessional conduct” because the phrase itself is sufficient to guide practitioners.

The ALJ is persuaded that the use of the word “incompetence” and the phrase “failure to conform to acceptable and prevailing practice” give fair warning to practitioners about what is prohibited. The rule notifies practitioners that their treatment is to “humane,” which is particularly instructive in this case, where treating an animal for pain is the issue. All three experts acknowledged that animals feel pain.¹³³ For this reason, the humane way to treat an animal’s pain is to provide pain medication.

Respondent also argues that he had inadequate notice, prior to the September 2006 conference, of any issue other than his care of Jazz. When more general questions arose about his treatment of spays and declaws, he was unfairly surprised, Respondent suggests.

The CRC has broad authority to meet with licensees. Minn. Stat. § 214.103 describes the procedures for investigating and resolving complaints

¹²⁸ *Humenansky v. Minnesota Bd. of Medical Examiners*, 525 N.W.2d 559, 564 (Minn. Ct. App. 1994), *rev. denied* (Minn. Feb. 14, 1995); *citing Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964); *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn. 1985).

¹²⁹ *Proetz v. Minnesota Bd. of Chiropractic Examiners*, 382 N.W.2d 527, 534 (Minn. Ct. App. 1986), *rev. denied* (Minn. May 16, 1986), *citing Matter of Welfare of A.K.K.*, 356 N.W.2d 337, 343 (Minn. Ct. App. 1984).

¹³⁰ Minn. Stat. § 156.081, subd. 1 (11).

¹³¹ Minn. R. 9100.0800, subp. 1.

¹³² 247 Minn. 520, 78 N.W.2d 351 (Minn. 1956).

¹³³ T. at 42; 392, 617.

about practice by a health professional. Among the permitted complaint resolution procedures is a conference which:

... may be held for the purposes of investigation, negotiation, education, or conciliation. The results of attempts at resolution with the regulated person may include a recommendation to the board for disciplinary action....¹³⁴

Clearly, the CRC was within its statutory procedures to use the conference for investigatory purposes by asking general questions about Respondent's practice.

Conclusion

For the reasons set forth above, the ALJ concludes that disciplinary action is warranted and has therefore recommended that such action be taken by the Board.

L. F. C.

¹³⁴ Minn. Stat. § 214.103, subd. 6.